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IN THE

Supreme Court of The United States

OCTOBER TERM, 1955

No. 395

MRS. JOSIE KATE GIANFALA, widow of
OSCAR J. MARTIN, et al.,
Petitioner

versus

THE TEXAS COMPANY,
Respondent

Petition For Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Mrs. Josie Kate Gianfala, widow of Oscar J. Martin, administratrix of the Estate of Oscar J. Martin, on behalf of decedent's widow, Mrs. Josie Kate Gianfala

Martin and the decedent's minor child, Dorothy Martin, with respect shows unto this Honorable Court as follows, to-wit:

1.

Citation to Official Report of Opinion Delivered in the Court Below

The only opinion rendered by the Court below is reported in 222 Fed. 2d 382, copy of which is to be found in Appendix I to the transcript of the record filed herewith.

2.

Grounds for the Court's Jurisdiction

The decree sought to be reviewed was rendered and entered May 13, 1955.

Petitioner filed application for rehearing June 2, 1955; which was denied on June 17, 1955.

The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. 1254 (1).

3.

Questions Presented For Review

This petition involves the following questions for determination by this Honorable Court:

a) Can an appellate court deprive a litigant of its statutory right to a trial by jury merely because the major portion or even all of the evidence in a case is elicited from one witness?

b) Can an appellate court disregard the jury's findings of fact that a man is a seaman and substitute its own findings of fact when there is evidence supporting the jury's findings?

c) Does temporary immobilization of a vessel cause an employee to lose his status as a seaman when the owner intends to mobilize the vessel momentarily without any change in the duties, compensation or other aspects of the employment?

d) Does the main purpose or business of an employer control in deciding whether an employee is a seaman, or does the manner of the use of the employee control?

e) When an individual though not a member of the crew is killed or injured while on board a vessel on navigable waters through the negligence of the owner or because of the unseaworthiness of the vessel does he have a cause of action under the General Maritime Tort Law?

4.

The Constitutional Provisions and Statutes Involved

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution,

the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all cases affecting Ambassadors, other public Ministers and Consuls, - to all cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between Citizens of the same State claiming Lands under Grants of different States and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Section 2 of Article 3 of the Constitution of the United States.

Recovery for Injury to or Death of Seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Mar. 4, 1915, c. 153, Sec. 20, 38

Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007. 46 U.S.C.A. Sec. 688, Pg. 277.

Extension of Admiralty and Maritime Jurisdiction; Libel in rem or in Personam; Exclusive Remedy; Waiting Period

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage." June 19,

1948, c. 526, 62 Stat. 496. 46 U.S.C.A., Sec. 740, Pg. 182.

Admiralty and Maritime Cases

"In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it." June 25, 1948, c. 646, 62 Stat. 953. 28 U.S.C.A., Sec. 1873, Pg. 639.

Statement of the Case

Decedent was employed by respondent as a fireman aboard its boiler barge which was operating on navigable waters within the territorial jurisdiction of the United States. While pursuing orders from his superior, Martin was killed when a cylinder, which was part of the equipment of one of respondent's barges, blew its housing and struck him. Respondent, The Texas Company, was engaged in a typical offshore drilling operation beneath navigable waters of the State of Louisiana and its coast line which necessitated the use of barges, tugs and other vessels together with the required personnel. Principally two vessels were used — a boiler and a drilling barge. By means of tugs these barges were moved to a location and through the use of their respective sea cocks temporarily sunk for

stability purposes. Once a well was completed, which normally required thirty to forty-five days the barges were raised with the use of steam from the boiler barge, floated to another location and the cycle of operation renewed.

The decedent, Martin, worked as a fireman aboard the boiler barge on the date of the accident the same as he had continuously for some fourteen years previously. During all of his employment with respondent the decedent never worked on land but always in conjunction with crews drilling over water and actually lived on water while on call during his tour of duty. At the beginning of a tour he, with others, was transported by boat to a camp about an hour's ride from the mainland, all of which was owned and maintained by respondent. Then daily the crew, including Martin, was again transported by boat to the barges for at least a twelve hour shift. The boiler barge measured 30 feet by 65 feet with a draft of 4 feet and the drilling barge 56 feet by 122 feet with a draft of 6 feet. Each was equipped with sea cocks so that when floated to a drilling site they could be temporarily anchored by flooding the holes. The barges were also equipped with "spuds", a device which was a permanent part of their equipment and could be lowered when the barge was on location to more firmly anchor it. When the barges prepared to move, as they always ultimately did, every month or so, the water was "jetted" from the holes by use of steam power provided by the fireman, Martin and his equipment aboard the boiler barge. All of the equipment, tools and cargo together with the crew aboard the barges were moved from place to place aboard these barges and these barges were used again and again in this same manner never being abandon-

ed at a drilling site and respondent never did anything to render them non-navigable or withdraw them from navigation.

The decedent was the only fireman on his twelve-hour shift, and his duties as a fireman set him apart from the men who worked in the drilling crew aboard the drilling barge. The principal duties of decedent were the maintenance and operation of the barge and the boilers on board. He tended the boilers and performed the necessary maintenance of the barge and boilers, such as upkeep, cleaning and painting, which was required to keep it in a navigable condition whenever the barge moved. The boiler barge furnished the steam power to "jet" the water from the holes of the barges. Martin operated the valves which controlled the steams to "jet" out and float both the barges and he closed the sea cocks before floating. He raised the spuds when preparing to move the boiler barge and had two crew members standing by to assist him in the move. He always rode the boiler barge whenever and wherever it was moved. On reaching a new location, with Martin aboard, he was responsible to open the sea cocks to immobilize the barge and to lower the spuds to anchor it to the bottom. All of decedent's duties were performed aboard the boiler barge and of necessity over navigable water for otherwise these barges could not have been floated to the designated locations by means of tugs or luggers.

Petitioner alleged that the decedent was a member of the crew of respondent's barge and as such he was entitled to a reasonably safe place in which to do his work; that he should have been supplied with suitable and safe means, material, appliances, and equipment for the proper per-

formance of his work; that decedent was killed by reason of the unsafe and unseaworthy conditions aboard and about the said barge and the negligence of respondent in that it continued to use a defective lift known to be dangerous by its crew member in charge. Respondent set out five defences, the principal one being that decedent was not a seaman under the 'Jones Act'.

Petitioner attempted to call respondent's crew member who was in charge under cross-examination but was forced to call him as her own witness. After being examined by petitioner's counsel who elicited certain facts to prove that decedent was a seaman respondent cross-examined him to bring out other facts tending to prove decedent was not a seaman. Once this witness was examined, cross-examined, and then again examined, respective counsel stipulated that all the remaining six-crew members if called would testify substantially the same as this first witness. No other witnesses were called to prove that decedent was a seaman and respondent did not call any witnesses whatsoever. However, the witness called by petitioner did testify to certain facts tending to prove that decedent was being employed in a manner which classes him as a seaman under the act and then in cross-examination testified to other facts which possibly could have caused a judge or jury to decide that decedent was not a seaman.

The Jury rendered a verdict in favor of petitioner in the sum of $40,000.00 under the Jones Act which through remittitur was subsequently reduced to $34,000.00. Respondent prosecuted an appeal to the Court of Appeals for the Fifth Circuit which on May 13, 1955 reversed the finding of the jury and the judgment of the District Court in its

entirety and rendered judgment for respondent reserving all rights of petitioner or other legal representative of deceased to Workmen's Compensation benefits under the law of the State of Louisiana.

6.

Argument of Reasons Relied Upon for the Allowance of This Writ of Certiorari

A. The Circuit Court Erred in Denying to Petitioner Her Statutory Right to a Trial by Jury.

The Circuit Court held that, because all of the testimony pertaining to whether the decedent was a seaman under the Jones Act was elicited principally from one witness, the determination of that question should not have been left to the jury. No authority for this holding was cited by the Circuit Court. The Jones Act grants to the petitioner the right to a trial by jury. It does not specify any number of witnesses as being prerequisite to that right. It has been held by this Court so often that no authority need be cited that, whether a person is a seaman under the Jones Act is a question of fact to be decided by a Jury. The Circuit Court's holding denying to petitioner that right is in direct conflict with this Court's holding in *South Chicago Coal & Dock Co. v. Bassett*, 1940, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 232; and with the decision of the Court of Appeals for the First Circuit, deciding *Gahagan Construction Corp. v. Armao*, 165 F. 2d 301.

In the South Chicago Case, Your Honors considered the determination of whether a man was a member of the crew of a vessel, or a longshoreman under the Longshoremen's and Harbor Workers' Compensation Act. The deputy commissioner, who determined questions of fact under the act, had held that he was a longshoreman. The district court retried the case and reversed the commissioner, holding him to be a member of the crew. The Court of Appeals then held that the commissioner's finding must stand, if supported by any evidence, and reversed the district court. On certiorari to this court the contention was made by the petitioner, that since the facts were not in dispute, determination of the decedent's status was a matter of law, which should have been resolved in its favor — the same contention which was adopted by the Fifth Circuit Court of Appeals in the case at bar. But that contention was rejected by Your Honors, who held that the commissioner's findings, even on the basis of undisputed facts, must stand if supported by any credible evidence. The holding was repeated and followed by the First Circuit in *Gahagan Const. Corp. v. Armao,* 165 F. 2d 301, 305, (1948), and this Court denied certiorari, 333 U.S. 876, 92 L. Ed. 1152, 68 S. Ct. 905.

The Circuit Court's holding is manifestly in conflict with the law pronounced in the two cases cited above. Until the decision in the instant case it had been the law that it was only where the appellate court found a complete absence of probative facts to support the conclusion reached by the jury that the appellate court would substitute its judgment for that of the jury. *Lavender v. Hurn,* 327 U.S. 645, 66 S. Ct. 740. But the Circuit Court here did not find a complete absence of probative facts to sustain the jury's findings. Indeed such cannot be said of the facts in the

instant case. There were many facts admitted by the witness which established that the decedent was a seaman, as shown by the record and as witnessed by the fact that the jury so found and the trial judge denied the motions for a directed verdict and for judgment notwithstanding the verdict.

The instant case represents a dangerous departure from that rule. It is a serious invasion of the right to a trial by jury guaranteed by the statute. Now the appellate court need only determine that the facts are undisputed, even though some of the undisputed facts point one way, and some another; and it will then be free to override the jury on any factual issue. Counsel will no longer feel free to save the time of the court by stipulating, either in pre-trial conferences or open court, repetitious or undisputed testimony for fear that they will deprive their clients of the right to a jury trial.

The Circuit Court said, to bolster its claim to a right to reject the jury's finding, that the facts were not in dispute and that "no one points to or even claims that there were any discrepancies or conflicts in his testimony." See page 8 of the opinion. This is not correct. One serious conflict in Taylor's testimony was pointed out in petitioner's brief in the Circuit Court. The point involved was the very material point as to how often the barge was moved from site to site. He testified first that it would be about once a year. (Tr. P. 51). But later he stated that at the time of the accident the barges had been at that site for 21 days and they were preparing to complete and shut down in the next two or three days. (Tr. Pp. 100 and 125). It moved shortly thereafter, and in the two years since the accident had

moved at least ten or twelve times. (Tr. P. 60). Actually there is an inherent conflict in Taylor's testimony as he testified to some facts which would show that the decedent was a seaman, then others which would show that he was not, and conflict or not, petitioner had the statutory right to have the question of fact resolved by the jury.

B. *Fourth and Sixth Circuits Conflict with Fifth Circuit As Result of Error in Deciding When an Employee is a Seaman.*

In arguendo, and in the event that the Fifth Circuit was correct in stating it could review the jury's finding of fact and substitute its own, nevertheless its holding is either in error or in direct conflict with decisions of both the Fourth and Sixth Circuit Courts of Appeal and the conflict should be settled by this Court. Petitioner relied heavily in oral argument on these other circuits' decisions, namely: *Jeffrey v. Henderson Bros.*, 4th Cir., 193 F. 2d 589 (1951); *Summerlin v. Massman Const. Co., et al.*, 4th Cir., 199 F. 2d 715 (1952); and *Wilkes v. Mississippi River Sand & Gravel Co.*, 6th Cir. 202 F. 2d 383 (1953); but despite the unusual similarity of the facts of those cases to the instant case, and counsel's argument of them both in the brief and before the court, no reference much less an attempt to distinguish them, is to be found in the opinion; but the presiding judge orally made the statement that these other circuits could not be correct. While, we will not review here all the facts of the cases of the Fourth and Sixth Circuits, it is most important to note that the basis for the holdings in each of these cases was not only rejected but a completely opposite view was taken by the Fifth Circuit. In *Jeffrey v. Henderson Bros.*, supra, the Court held that the use of a

mobile vessel to transport the equipment with men working aboard constituted the distinctive character of the operation and held the employee to be a seaman, despite the fact that the barge had no motive power, no sleeping quarters, was secured by mooring lines and spuds, was anchored so close to shore that the employees boarded or disembarked at times by gangplank, the particular employee's maritime duties were reduced to a minimum and his principal duties were such as would normally be performed on land. It was contended that the employee could not be a seaman at the time of injury for the vessel was withdrawn from commerce, fastened to the land and the employee was nothing more than a machine shop worker. The Fourth Circuit rejected these contentions and held the man to be a seaman but the Fifth Circuit now adopts those same arguments for its holding and rejects the arguments advanced by this petitioner though they were taken from the holding of these other Circuits.

This same Fourth Circuit in *Summerlin v. Massman Const. Co., et al.*, supra, again held the employee to be a seaman where he was a fireman on board a derrick barge without motive power or sleeping quarters which was anchored in a river used solely for the purpose of pouring concrete into bridge forms in a river and being moved only from time to time as construction progressed.

The Sixth Circuit in the *Wilkes v. Mississippi River Sand and Gravel Co.*, supra, held that an employee cannot hire personnel to work exclusively on water, allow them to have such a permanent attachment with a vessel as to expose them to the same marine hazards as ordinarily seaman are

exposed to and then limit their liability by adopting nomenclature pertaining to shore employment for these men.

If these other Circuits were correct in holding those employees to be seamen how can the Fifth Circuit now hold that this man was not a seaman? A man who never worked on land but only aboard a barge, which he maintained, raised and lowered and on which he rode whenever it moved while assisting in its move; a barge which transported from place to place both this employee and all equipment necessary to the employer's operation until the employee was killed aboard it.

C. *Temporary Immobilization of a Vessel Does not Cause an Employee to Lose his Status as a Seaman.*

Petitioner further shows that the Fifth Circuit has erred in its interpretation and application of this Court's decision in *Desper v. Starved Rock Ferry Co.*, 352 U.S. 187, 72 S. Ct. 216 (1952). Mr. Justice Jackson in the Desper Case clearly pointed out that at the time of injury Desper had completed and terminated his employment as a seaman and was then at work making the boats, which were blocked up, ready for navigation. He had been rehired for different wages, under an entirely different arrangement and had only a hope for re-employment as a seaman on boats that might never be launched. Here the decedent's employment never terminated or varied. There was no question of re-employment in a seasonal business. He was a fireman from January through December always on one vessel and never let out with only a hope of future employment aboard a vessel that might not be launched. The Desper Case, like numerous

other decisions following it involved seasonal employment on vessels which were completely withdrawn from navigation, is not applicable to this case and the Fifth Circuit erred in basing its reversal thereon. Further the fact that this barge was temporarily immobilized at the precise moment of injury does not destroy the decedent's identity as a seaman or the barge's identity as a vessel. *Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.*, 1st Cir., 256 Fed. 497; *In re P. Sanford Ross*, 196 Fed. 921. The holding to the contrary by the Fifth Circuit in this case therefore places it in hopeless conflict with still another Circuit, the First Circuit.

D. *An Individual When Not a Member of a Crew of a Vessel is Killed or Injured While On Board a Vessel on Navigable Waters Through Negligence of the Owner or Unseaworthiness he Can Recover Under General Maritime Tort Law.*

Under the 'General Maritime Tort Law' and Your Honors' decision in *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202 (1953), the verdict of the jury should not have been reversed by the Fifth Circuit even if their findings of fact and holding that the decedent was not a seaman were correct. There is no question but the decedent was killed while unloading a vessel on navigable waters because of the unseaworthy condition of the vessel and the negligence of its employees. Further there is diversity of citizenship, jurisdictional amount and a complete lack of contributory or comparative negligence on the part of decedent. The judgment of the Trial Court must therefore be reinstated even

if decedent is found not to be a seaman because of the 'General Maritime Tort Law.'

Wherefore, Petitioner respectfully prays that this petition be granted and that a writ of certiorari issue, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Honorable Court, for its review and determination, a full and complete transcript and record of all proceedings in the cause entitled "The Texas Company versus Mrs. Josie Kate Gianfala, widow of Oscar J. Martin, et al.," and reverse title, bearing Number 15404 on the Docket of the Court of Appeals for the Fifth Circuit, to the end that the judgment and opinion of said Court of Appeal may be reversed by this Honorable Court and the judgment of the Trial Court reinstated herein;

Petitioner further prays for such other and further relief in the premises as may seem proper and just.

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New Orleans 12, Louisiana

J. Gibson Tucker, Jr.
Russell J. Schonekas
of Counsel

I, the undersigned, of counsel for petitioner, hereby certify that I have served a copy of the foregoing petition upon Ernest Carrere, Esq., of the firm of May and Carrere, attorneys for respondent, at 409 California Building, New Orleans, Louisiana, this 14th day of September, 1955, by mailing a copy thereof postage prepaid to Ernest Carrere, Esq., in care of May & Carrere, 409 California Building, New Orleans 12, Louisiana.

_____

Attorney for Petitioner

No. 395. GIANFALA ET AL. *v.* TEXAS COMPANY. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to reinstate its judgment. *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251; *Summerlin* v. *Massman Const. Co.,* 199 F. 2d 715; *Wilkes* v. *Mississippi River Sand & Gravel Co.,* 202 F. 2d 383; *Gahagan Const. Corp.* v. *Armao,* 165 F. 2d 301, 305. *Raymond H. Kierr* for petitioners. Reported below: 222 F. 2d 382.